Bickerstaff Clay Products, Inc. *and* Laborers Local Union No. 246. Case 10-CA-17949

13 June 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND HUNTER

On 3 January 1983 Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as it Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Bickerstaff Clay Products, Inc., Russell County, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] As noted by the Administrative Law Judge, Respondent admitted the jurisdictional allegations in the complaint. Accordingly, we find specifically that, during the past calendar year, which period is representative of all times material hereto, Respondent sold and shipped from its Russell County, Alabama, facilities finished products valued in excess of $50,000 directly to customers outside the State of Alabama. Therefore, Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard in Columbus, Georgia, on October 21, 1982. The complaint, which issued on April 22, 1982, and is predicated on a charge filed on March 1, 1982, and amended on March 24, 1982, alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act by refusing to recall employees Wiley Jackson, Rozell Preer, Derrick Phillips, and Johnnie Williams following an economic layoff, and Section 8(a)(1) and (5) of the Act by refusing to furnish the Union with information requested which was relevant to grievances regarding the layoffs of the four above-mentioned employees.

Upon the entire record and from my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I hereby make the following findings.

The Evidence[1]

The allegations involve grievances of and failure to recall from layoff employees Wiley Jackson, Rozell Preer, Derrick Phillips, and Johnnie Williams. There is no allegation that the layoffs of Jackson, Preer, Phillips, and Williams were unlawful. During the fall of 1981 and January and February 1982, Respondent laid off a total of 35 employees.

Wiley Jackson had previous periods of employment with Respondent. His most recent employment date was March 26, 1979. At the time of his layoff on September 18, 1981, Jackson was employed as "stacker" in Respondent's plant 42.

Rozell Preer, like Jackson, was employed as a "stacker" in plant 42 when he was laid off on September 18, 1981. Preer was hired on February 10, 1981.

Derrick Phillips was employed as a "stacker" in plant 32 when he was laid off on September 18, 1981. Phillips was hired on February 23, 1981.

Johnnie Williams was laid off on February 24, 1982. At that time, Williams' job was "yard laborer" in plant 41. Mr. Williams was first employed on June 16, 1981.

Grievances were filed regarding the above layoffs among others. On October 7, 1981, grievance meetings were held regarding the layoffs of Jackson, Preer, and Phillips. Union Business Manager Tommy Williams testified that he was told during the October 7, 1982, grievance meeting that Jackson, Preer, and Phillips were selected for layoff because their job performances had been poor. Williams stated that, upon being advised of the basis for the three employees' layoffs, he requested the personnel files on those employees.

Respondent's vice president of production, Richard Matheny, testified regarding the October 7, 1982, grievance meetings. Matheny admitted that employees Jackson, Preer, and Phillips had been laid off out of seniority but Matheny contended that the three had been selected because of their "overall ability." Matheny also admitted that the Union was not informed before the October 7 meetings why Jackson, Preer, and Phillips had been selected.

Matheny admitted that the Union asked to see the personnel files for Jackson, Preer, and Phillips after being told of Respondent's basis for selecting the three for layoff. Matheny replied he would have to check with Respondent's attorney. Shortly after October 7, Respondent informed the Union that the requested personnel files would not be available to the Union. All three grievances were denied on October 8, 1981.

[1] The commerce facts and conclusions are not at issue. The complaint alleges, the answer admits, and I find that Respondent, a Georgia corporation with offices and places of business located in Russell County, Alabama, where it is engaged in the manufacture of bricks, is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. The complaint also alleges, and Respondent admits, that the Charging Party (Union) is a labor organization within the meaning of Sec. 2(5) of the Act.

Following the layoff of Johnnie Williams, a grievance meeting was held in his regard on March 1, 1982. Business Manager Williams testified that in preparation for that meeting he phoned for Richard Matheny on the day before the meeting. Matheny was out, and Williams was connected with Lee McDaniel. Williams testified that he asked McDaniel to see the personnel files of the meetings the next day. Tommy Williams testified that he was never supplied with those files. Richard Matheny denied that the Union requested Johnnie Williams' personnel file. However, Lee McDaniel did not testify. Johnnie Williams' grievance was denied by Respondent on March 2, 1982.

All four alleged discriminatees are members of the Union. Respondent was aware of their union memberships. Each of the four had union dues deducted from his pay. Neither Derrick Phillips nor Wiley Jackson has been recalled. Johnnie Williams was recalled on June 28, 1982. He was subsequently terminated on July 12, 1982, when he did not report for work. Rozell Preer was recalled on July 6, 1982, but was terminated on July 12, 1982.

It is uncontested that from the dates of their recalls, Respondent satisfied all legal recall obligations, if any existed, as to Johnnie Williams and Rozell Preer.

Conclusions

(i) *The refusal to reinstate*: Although the General Counsel does not allege that any of the layoffs were illegal, he does allege that Respondent violated Section 8(a)(1) and (3) to the extent it failed to recall Jackson, Phillips, Preer, and Williams.

In support of its recall allegations, the General Counsel argues that a *prima facie* case was established when it proved that known union members were passed over for recall in favor of Respondent hiring new employees. In that regard, the General Counsel contends that Respondent's assertion that laid-off employees' work performance was the overriding indicia used in determining recall should be rejected since no competent evidence demonstrated that the work of Jackson, Preer, Phillips, or Williams was inferior to what could be expected from an inexperienced new hire.

Unfortunately, from the General Counsel's standpoint, that argument fails to withstand a logical analysis. In the first place, that particular argument is inconsistent with the General Counsel's failure to allege that the layoffs of Jackson, Preer, Phillips, and Williams were illegal in view of the fact that work performance was the precise reason given for those layoffs. At the time of the layoffs, Respondent knew the union membership of Jackson, Preer, Phillips, and Williams, and the General Counsel does not argue that any occurrences subsequent to the layoffs contributed to Respondent's failure to recall those employees.[2]

Secondly, there was no showing that Respondent's recall procedure differed from past incidences of recall following layoffs, or that union members were discriminated against in the recall. In regard to the discrimination question, Respondent showed that 20 of the 35 laid-off employees have been recalled. Twelve of the 20 recalls were union members. Before the September 1981 layoffs, there were 259 employees in the bargaining unit, 159 were union members. At the end of 1981, there were 222 or 223 employees in the unit, 146 were union members. In October 1982 there were 208 employees in the unit, and 130 were union members. Those figures failed to establish a trend of discrimination in the layoffs or recalls against union members, and no evidence was forthcoming which showed such a trend.

The General Counsel argues that the absence of work performance discipline notations in the files of Jackson, Preer, Phillips, and Williams proved that their work performance was not poor. However, while the absence of such disciplinary notations may well support a grievance under the layoff provisions of the parties' collective-bargaining agreement (see next section of this Decision), that fact alone does not demonstrate discriminatory treatment. Here, there is no showing of inconsistencies regarding the selection of nonunion employees for layoff or recall; i.e., there was no showing that the personnel files either contained or did not contain disciplinary notations.

Richard Matheny testified that employees were considered for layoff and recall because (in the opinion of their immediate supervisors) of the quality of their work performance and their attendance. That procedure is legitimate under the Act, even though it may or may not be permitted under the collective-bargaining agreement. Again, the bottom line for my inquiry must be does the procedure demonstrate unlawful discrimination. I found the answer to be no discrimination was proven. Respondent established a nondiscriminatory business basis for its recall selection. That evidence, which was subject to attack from the General Counsel, was not overcome. The General Counsel failed to show that nonunion employees were recalled before Jackson, Preer, Phillips, and Williams, even though their work records were inferior to the alleged discriminatees. See *Wright Line*, 251 NLRB 1083 (1980); *Weather Tamer v. NLRB*, 676 F.2d 483 (11th Cir. 1982).

There was no showing of union animus. The General Counsel argues that Respondent's action was inherently destructive of protected rights. However, this case must be distinguished from cases where reinstatement was denied or delayed following strike activity. Here, the layoffs were economically motivated. There was no showing or allegation that the layoffs were related to protected activity, and there was no other proximate connection demonstrated between any protected activity and the failure to recall. Moreover, there was no evidence that Respondent ever indicated any hostility toward the union or protected activities of the employees.

[2] In that regard, the only postlayoff occurrence that was supported by the record, which could have contributed to an unlawful motive, was filing and processing by Jackson, Preer, Phillips, and Williams of their layoff grievances. However, the evidence showed that other laid-off employees filed and processed similar grievances, and there was no showing that those grievances differed from those of the alleged discriminatees. Moreover, the General Counsel did not show or argue that the four alleged discriminatees' grievances contributed to Respondent's failure to promptly recall them.

Therefore, I find that the allegation of unlawful refusal to recall was not proven (cf. *Earle Industries*, 260 NLRB 1128 (1982), where the evidence demonstrated animus, timing, and a motive of disenfranchising employees from voting in an NLRB election).

(ii) *Failure to furnish information*: It is well established that unions have a "statutory right to potentially relevant information necessary to allow it to decide if the underlying grievances have merit and whether they should be pursued . . . ." (*Safeway Stores*, 236 NLRB 1126 (1978); see also *United-Carr Tennessee*, 202 NLRB 729 (1973); and *Worcester Polytechnic Institute*, 213 NLRB 306 (1974)). Employees' bargaining representatives must be afforded access to relevant records for the purpose of carrying out their bargaining duties (*J. P. Stevens & Co.*, 239 NLRB 738 (1978)). Those duties include the processing and arguing of grievances under applicable collective-bargaining agreements as noted in the below-cited cases:

> There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. . . . The duty to bargain unquestionably extends beyond the period of contract negotiations and applies to the labor-management relations during the term of an agreement. [*NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).]
>
> The duty to bargain in good faith requires an employer to furnish information that the bargaining agent needs for the proper performance of its duties . . . . The obligation extends to the union's needs for information during the administering and policing of a contract as well as during contract negotiations. [*Western Mass. Electric Co. v. NLRB*, 589 F.2d 42 (1st Cir. 1978).]
>
> The Board has long held that a union, as the bargaining agent of the employees involved, is entitled to relevant information which is necessary to fulfill its role as bargaining agent in the administration of its collective-bargaining agreement. [*Equitable Gas Co.*, 227 NLRB 800 (1977); see also *Procter & Gamble Mfg.*, 237 NLRB 747 (1978); *Canal Electric Co.*, 245 NLRB 1090 (1979).]

Here the evidence is convincing that the Union, through Business Manager Tommy Williams made timely requests for the personnel files of Jackson, Preer, Phillips, and Williams. Richard Matheny admitted that Tommy Williams requested the files of Jackson, Preer, and Phillips during the October 7, 1981, grievance meetings. As to Johnnie Williams, Union Business Manager Williams testified that he asked Lee McDaniel for that file on the day before the scheduled March 1, 1982, grievance meetings. I was impressed with Tommy Williams' demeanor, and I credit his testimony, especially in view of the lack of competent evidence to the contrary. Lee McDaniel was not called to testify.

The applicable collective-bargaining agreement, with a duration of November 1, 1979, through October 31, 1982,[3] provides as follows:

ARTICLE XIII—SENIORITY

> When, for any reason, the employee work force is increased or reduced, or when promotions, transfers, or demotions are made, the following factors as listed below shall be considered:
>
> 1. Ability to perform work.
> 2. Physical fitness.
> 3. Length of continuous service.
>
> When in the sole judgment of the Company, both factors (1) and (2) are relatively equal, then length of continuous service shall be the determining factor.

Respondent admitted during the hearing that Jackson, Preer, Phillips, and Johnnie Williams were laid off "out of seniority." During the grievance proceeding, the Union was advised that those employees were selected for layoff under item 1, above, "Ability to perform work." Against that background, it is obvious, and I find, that the requested personnel files contained "potentially relevant information." The Union should have been given access to the requested personnel files in sufficient time to enable it to consider and use those files in processing the grievances of the alleged discriminatees.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Laborers Local Union No. 246 is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed at Respondent's Plants 1 and 2, Ceramic, Alabama; Plant 3, Dixieland, Alabama; and Plant 4, Brick Yard. Alabama, including the sample department, Ceramic, Alabama, but excluding the material handling division, plant clerical employees, office clerical employees, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[4]

4. At all times material herein, Laborers Local Union No. 246 has been, and is, the exclusive collective-bargaining representative of the employees in the above-mentioned appropriate unit.

5. By refusing to furnish the Union with the personnel files of Wiley Jackson, Rozell Preer, and Derrick Phillips, since on or about October 7, 1981, and refusing to furnish the personnel file of employee Johnnie Williams

[3] In that regard, Respondent, in its answer, admits that the Union was its employees' bargaining representative only until November 1, 1979. In view of the existence of the above-mentioned collective-bargaining agreement, I find that the Union is the exclusive bargaining representative of the employees in the admittedly appropriate unit at all material times.

[4] Although the alleged discriminatees herein were mentioned as being employed in plants 32, 41, and 42, the evidence revealed that those plants, although identified with other numbers, are actually among the plants set forth in the description of the appropriate bargaining unit.

since on or about March 1, 1982, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. Respondent has not otherwise engaged in violations of unfair labor practices as alleged in the complaint.

THE REMEDY

Having found Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As I have found Respondent unlawfully refused to furnish personnel files regarding employees Jackson, Preer, Phillips, and Williams, I shall recommend that Respondent be ordered to furnish those files to the Union upon request. Further, in view of my findings that the Union is entitled to consider those files and use them in grievance proceedings, I shall recommend that the status quo be restored by reopening the grievance proceedings of Jackson, Preer, Phillips, and Williams as those proceedings existed on October 7, 1981, and March 1, 1982, respectively, and that any resolution of those grievances be given retroactive effect.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

The Respondent, Bickerstaff Clay Products, Inc., Russell County, Alabama, its officers, agents, successor, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain collectively with Laborers Local Union No. 246, as the exclusive representative of its employees in the following appropriate bargaining unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, by refusing to furnish the Union with requested files and other information potentially relevant to the Union's obligation as the employees' exclusive collective-bargaining representative:

> All production and maintenance employees employed at Respondent's Plant 1 and 2, Ceramic, Alabama; Plant 3, Dixieland, Alabama; and Plant 4, Brick Yard, Alabama, but excluding the material handling division, plant clerical employees, office clerical employees, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed to be necessary to effectuate the policies of the Act:

(a) Rescind its actions in denying the grievances of employees Wiley Jackson, Rozell Preer, Derrick Phillips, and Johnnie Williams; furnish the Union with the files and other information which is potentially relevant to those grievances, upon request by the Union; and restore the *status quo ante* by reconsidering those grievances, if requested by the Union, at the state those proceedings existed on October 7, 1981, in the cases of Jackson, Preer, and Phillips, and on March 1, 1982, in the case of Johnnie Williams.

(b) Post at its facilities located in Russell County, Alabama, copies of the attached notice marked "Appendix."[6] Copies of said notices, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Laborers Union No. 246 as the exclusive collective-bargaining representative of our employees in the appropriate bargaining unit described:

> All production and maintenance employees employed at Respondent's Plants 1 and 2, Ceramic, Alabama; Plant 3, Dixieland, Alabama; and Plant 4, Brick Yard, Alabama, including the sample department, Ceramic, Alabama, but excluding the material handling division, plant clerical employees, office clerical employees, professional employees and supervisors as defined in the Act.

WE WILL NOT refuse to furnish the Union with requested files and other information potentially relevant to the Union's obligation as exclusive collective-bargaining representative of the employees in the above-described bargaining unit.

WE WILL NOT in any other like or related manner interfere with, restrain, or coerce our employees with respect to their exercise of rights guar-

anteed them by Section 7 of the National Labor Relations Act.

WE WILL, upon request by the Union, rescind our actions in denying the grievances of employees Wiley Jackson, Rozell Preer, Derrick Phillips, and Johnnie Williams; furnish the Union with files and other inforamtion which is potentially relevant to those grievances; and restore the *status quo ante* by reconsidering those grievances at the state of the proceeding as they existed on October 7, 1981, in the cases of Jackson, Preer, and Phillips, and on March 1, 1982, in the case of Johnnie Williams.

BICKERSTAFF CLAY PRODUCTS, INC.